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## State Water Resources Control Board

**TO:** Santa Monica Bay Restoration Commission  
Tom Ford, Executive Director

**FROM:** *Original signed by:*  
Frances L. McChesney  
Attorney IV  
**OFFICE OF CHIEF COUNSEL**

**DATE:** October 14, 2016

**SUBJECT:** OCTOBER 20, 2016 GOVERNING BOARD MEETING; COMMENTS  
REGARDING PROPOSITION 84 GRANT RECOMMENDATIONS [AGENDA  
ITEM NO. 3.b.]

At the regular meeting of the Governing Board of the Santa Monica Bay Restoration Commission (SMBRC) scheduled for October 20, 2016, you will be considering whether to recommend to the State Water Resources Control Board (State Water Board) that it award grants pursuant to Proposition 84 to several local public entities to implement projects intended to further the restoration of the Santa Monica Bay and its tributaries.

By way of background, Proposition 84 - the Safe Drinking Water, Water Quality and Supply, Flood Control, River and Coastal Protection Bond Act of 2006 - allocated \$90 million to the State Water Resources Control Board for coastal improvement projects. Of this amount, \$18 million was to be made available to the SMBRC for projects that protect Santa Monica Bay beaches and coastal waters. The funds from Proposition 84 are not appropriated to the SMBRC for it to award to grantees. Rather, the SMBRC considers whether projects are consistent with Proposition 84 and then makes recommendations to the State Water Board, which then awards grants for the projects.

On September 14, 2016, Mr. Walter Lamb sent an email to the Executive Committee of the SMBRC commenting on the SMBRC's consideration of recommendations regarding Proposition 84 grants. I am providing a response to Mr. Lamb's comments.

Comment: Mr. Lamb appears concerned that the SMBRC's consideration of whether to recommend that the State Water Board award Proposition 84 grants raises a potential conflict of interest for the members of the SMBRC due to the involvement of The Bay Foundation (TBF) with the SMBRC.

Response: Contrary to Mr. Lamb's statements, your consideration and voting on the agenda items regarding Proposition 84 grants does not create a conflict for any public member of the Governing Board due to your membership on the Governing Board or the involvement of TBF.<sup>1</sup>

I will first address the potential that a Governing Board member may violate laws regarding conflicts if it were to vote on the recommendations. State law provides that members of the Legislature, state, county, district, judicial district, and city officers or employees (i.e., "officers") shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members. See Government Code §1090. State law further states, however, that an officer shall not be deemed to be interested in a contract by a body or board of which the officer is a member if the officer has only a "remote interest." Remote interests are identified. See Government Code §1091. State law also provides multiple specific exceptions to the prohibition regarding financial interests. See Government Code §§1091.1 through 1091.5. In summary, there is a limited exception to the financial interest prohibition if the interest by an officer is remote and there is a full exception to the prohibition based on the specifically identified exceptions.

To determine the applicability of the Government Code it is important to understand the nature of the proposed action on your October 20, 2016 agenda. The Governing Board will be considering whether to recommend to the State Water Board that it award Proposition 84 grants to five applicants. The SMBRC will not approve or award the grants itself, but will only make a recommendation. The State Water Board will, in turn, make its own independent determination on whether to issue the grants and if it chooses to award the grants, the State Water Board, not the SMBRC, will award the grants.

In this situation, no conflict even arises because the approval of a recommendation to the State Water Board is not the approval of a contract. In other words, the Governing Board is not entering into a contract with any entities represented on the Governing Board; it is the State Water Board that would be entering into contracts (e.g., grants) with entities that might be represented on the Governing Board. So, voting on the resolutions raises no potential to violate the prohibition regarding financial interests. Even if the SMBRC itself were voting to enter into a contract with one of the represented cities, no conflict would arise because of the exceptions set forth in the Government Code. For example, an officer's interest is considered remote if the officer receives a salary, per diem, or reimbursement for expenses from a government entity. See Government Code §1091(b)(13).

Mr. Lamb also raised a question regarding conflicts if any grant were to be awarded to TBF or that a City awarded a grant were to enter into a contract with TBF to implement the grant. Again, it is important to understand the nature of the proposed action. As noted above, the

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<sup>1</sup> Note that this Memorandum focusses on those members of the Governing Board who represent public agencies or the Legislature. Some members of the Governing Board represent for-profit or not-for-profit entities. The Memorandum does not address conflicts that could arise for those entities because the resolutions to be considered by the Governing Board involve the award of grants to public agencies not to any of the non-public member entities of the Governing Board.

Governing Board will not be awarding grants itself. In addition, the applicants for grant funding are all local agencies; the Governing Board will not be recommending that grants be awarded to TBF.

Even if the Governing Board were considering recommending that a grant be awarded to TBF or that a local agency receiving a grant might contract with TBF, there is no conflict raised. State law provides a specific exemption for contracts (including grants) involving a nonprofit, tax-exempt corporation having among its primary purposes the conservation, preservation, or restoration of park and natural lands or historical resources for public benefit. See Government Code section 1091.5(a). TBF is such a nonprofit tax-exempt corporation.

Mr. Lamb has also raised a concern because some cities, at the request of the former Executive Officer of the SMBRC, made donations to TBF. Such donations are not relevant to the proposed action before the Governing Board, which as noted above involves resolutions making recommendations to the State Water Board regarding the award of grants.

In summary, as officers representing various local agencies, you have no conflict regarding the resolutions on your agenda due to your position on the SMBRC, even if your City might ultimately be one of the grant recipients.

Mr. David Coupe will attend the Governing Board meeting and can provide further legal advice as needed. If you have questions regarding this Memorandum, your particular situation, or Mr. Lamb's comments, you can contact me at [Frances.McChesney@waterboards.ca.gov](mailto:Frances.McChesney@waterboards.ca.gov) or at (916) 341-5174 or Mr. Coupe at [David.Coupe@waterboards.ca.gov](mailto:David.Coupe@waterboards.ca.gov) or at (510)622-2306.

